(1)

Supreme Court, U.S.
FILED

No. 03-783 SEP 24 2003

In The

Supreme Court of the United States

FAIRMOUNT PROPERTIES, INC.,

Petitioner,

vs.

ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA
AND
THE CITY OF PHILADELPHIA,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the denial of a dimensional variance by Respondent Zoning Board of Adjustment of the City of Philadelphia to Petitioner Fairmount Properties, Inc. to construct an addition to Petitioner's existing commercial/residential building a denial of equal protection, when the other buildings on Petitioner's street are not required to comply with the City's zoning laws?

2. Was the denial of a dimensional variance by Respondent Zoning Board of Adjustment of the City of Philadelphia to Petitioner Fairmount Properties, Inc. to construct an addition to Petitioner's existing commercial/residential building an unlawful taking of private property without just compensation, because it deprived Petitioner the full use of its property?

LIST OF PARTIES

1. Fairmount Properties, Inc. (Petitioner)
   2333 Fairmount Avenue
   Philadelphia, PA 19130

2. Zoning Board of Adjustment of the
   City of Philadelphia (Respondent)
   Concourse Level
   Municipal Services Building
   1401 John F. Kennedy Blvd.
   Philadelphia, PA 19102

3. City of Philadelphia (Respondent)
   15th Floor, One Parkway
   1515 Arch Street
   Philadelphia, PA 19102-1595

4. Fairmount Civic Association (Intervenor)
   Suite 1416
   1700 Market Street
   Philadelphia, PA 19103

CORPORATE DISCLOSURE STATEMENT FOR FAIRMOUNT PROPERTIES, INC.

There is no parent corporation of Fairmount Properties, Inc. and there is no publicly held company that owns 10 percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Commonwealth Court of the Commonwealth of Pennsylvania be issued in this case.

CITATIONS OF THE OFFICIAL & UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY COURTS OR ADMINISTRATIVE AGENCIES

(Attached to Appendix)

1. Notice of Decision of Respondent Zoning Board of Adjustment of the City of Philadelphia, No. 01-1094, issued November 29, 2001. This decision denied Petitioner's application for a zoning variance.

2. Order of the Hon. Matthew D. Carrafiello of the Philadelphia County Court of Common Pleas, December Term 2001, No. 623, entered June 28, 2002. This Order affirmed the decision of the Respondent Zoning Board of Adjustment of the City of Philadelphia denying Petitioner's application for a zoning variance.

3. Order of the Hon. Renee L. Cohn of the Pennsylvania Commonwealth Court, No. 1688 C.D. 2002, entered January 16, 2003. This Order affirmed the decision of the Philadelphia County Court of Common Pleas.

4. Opinion by the Hon. Renee L. Cohn of the Pennsylvania Commonwealth Court, No. 1688 C.D. 2002, filed January 16, 2003. This non-reported Opinion explained the Court's reasoning in upholding the decision of the Philadelphia County Court of Common Pleas.

5. Order, per curiam, of the Pennsylvania Supreme Court, No. 80 EAL 2003, entered May 23, 2003. This

Order denied Petitioner's Petition for Allowance of Appeal from the Pennsylvania Commonwealth Court.

6. Order, per curiam, of the Pennsylvania Supreme Court, No. 80 EAL 2003, entered July 2, 2003. This Order denied Petitioner's Application for Reconsideration.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . . "

The date on which the final judgment of the Supreme Court of Pennsylvania was issued was July 2, 2003. A copy of the Order is attached to the Appendix of this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner Fairmount Properties, Inc. ("Petitioner") is a duly-organized Pennsylvania corporation with offices at 2333 Fairmount Avenue, Philadelphia, PA 19130 (the "Property"). Petitioner owns and manages real estate, including the Property.

The Property includes a three-story commercial/residential building located in a zoning district that is zoned C-2 Commercial District. The first floor is occupied by a law office, which also serves as offices of Petitioner, and two other offices; the second floor contains two apartments and a vacant ballet studio; and the third floor contains one apartment.

The front of the building faces Fairmount Avenue, a major thoroughfare, while the rear of the building faces Olive Street, a small street. The building, exclusive of the addition that is the subject of the instant petition, is approximately 95 feet long and 54 feet wide.

On July 3, 2001, Petitioner filed an application with the Philadelphia Department of Licenses & Inspections ("L&I") for a variance for a three-story addition to the rear of the Property. An amended application was filed September 11, 2001. Previous to the construction of the

addition, there was a empty lot between the rear of the building and the Olive Street sidewalk. The addition was built out to the sidewalk. According to Petitioner's application to L&I, the dimensions of the addition are 54 feet, 1 inch wide (facing Olive Street); and 21 feet, 2 inches on the west side, which tapers to 6 feet on the east side.

On September 24, 2001, L&I turned down Petitioner's application. According to L&I, Section 14-303(4)(g)(.2) of the Zoning Code requires the Property to have a rear yard with a minimum depth of 9 feet and a minimum area of 344 square feet. L&I's position was that the addition eliminates the rear yard entirely, and thus the application could not be granted.

Petitioner filed a Petition for Appeal to the Respondent Zoning Board of Adjustment of the City of Philadelphia ("Respondent") on October 2, 2001. Respondent denied the petition for a dimensional variance in a Notice of Decision issued November 29, 2001. (Attached as Appendix "F" of this Petition).

Petitioner filed an appeal of Respondent's decision to the Philadelphia County Court of Common Pleas on December 6, 2001. The City of Philadelphia was included as an additional Respondent, although both Respondents were represented by the same attorney, namely the City's Law Department, and their interests were identical.

The Hon. Matthew D. Carrafiello of the Philadelphia County Court of Common Pleas upheld Respondent's decision in an Order dated June 28, 2002. (Attached as Appendix "C").

The Petitioner then appealed the Court of Common Pleas Order to the Pennsylvania Commonwealth Court on

July 10, 2002. On January 16, 2003, the Hon. Renee L. Cohn of the Pennsylvania Commonwealth Court issued an Opinion affirming the Order of the Court of Common Pleas. (Attached as Appendix "B"). Judge Cohn also released an Opinion on January 16, 2003 that explained the reasoning for the Commonwealth Court's Order. (Attached as Appendix "A").

The Petitioner then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court denied Petitioner's Petition on May 23, 2003. (Attached as Appendix "D"). In its final ruling in this case, the Pennsylvania Supreme Court denied Petitioner's Application for Reconsideration on July 2, 2003. (Attached as Appendix "E").

Petitioner contends that the denial by Respondent for a dimensional variance to construct the addition to its existing building is a denial of equal protection under the 14th Amendment, because other buildings on Olive Street, the small street on which the addition faces, do not comply with the City's zoning laws. These buildings are constructed out to the street, yet they are not required by Respondent to have setbacks from the sidewalk. Respondent is treating Petitioner unequally by denying the variance. This equal protection argument has been raised by Petitioner at all levels of this case, from Respondent's level through the Common Pleas Court, Commonwealth Court and Pennsylvania Supreme Court levels.

Petitioner also contends that the denial by Respondent for a dimensional variance to construct the addition to its existing building is an unlawful taking of private property without just compensation, and thus violates the 5th Amendment, because it deprives Petitioner the full use

of its property. Petitioner has argued, at all levels of this case, that the addition would not harm the health or welfare of the neighborhood. Petitioner also argued, at all levels, that by not approving the addition, Respondent would impose a financial hardship on Petitioner. This unlawful taking argument has been raised by Petitioner at all levels of this case, from Respondent's level through the Common Pleas Court, Commonwealth Court and Pennsylvania Supreme Court levels.

REASONS FOR GRANTING THE PETITION

The decision of Respondent Zoning Board of Adjustment of the City of Philadelphia to deny Petitioner a variance for an addition to Petitioner's existing building denies Petitioner's rights under the 14th and 5th Amendments to the U.S. Constitution. This is an important federal issue, because it involves the question of how far a government agency can go to restrict private property rights for the benefit of the public at large.

Petitioner contends that it was denied the equal protection of the laws, because other property owners on the same street did not have to comply with the City's zoning laws. Petitioner contends that the denial of a variance was an unlawful taking, because it deprived Petitioner the use of its property for no reasonable reason. The Zoning Code in this instance was applied arbitrarily, and the public at large would not have been harmed if the variance were granted.

By ultimately upholding the decision of Respondent, the Pennsylvania Supreme Court's final order of July 2,

2003, deprives Petitioner of its rights under the Fourteenth and Fifth Amendments.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

HAE YEON BAIK, ESQUIRE
Counsel for Petitioner

Date: 9/26/03

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fairmount Properties, Inc., Appellant	: No. 1688 C.D. 2002 : Argued: December 3, 2002
v.	:
Zoning Board of Adjustment of the City of Philadelphia and the City of Philadelphia	:

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE L. COHN, Judge
HONORABLE JESS S. JIULIANTE, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE COHN **FILED: January 16, 2003**

Fairmount Properties, Inc. (Fairmount) appeals from the June 28, 2002 order of the Court of Common Pleas of Philadelphia County (trial court) affirming the November 29, 2001 decision of the Zoning Board of Adjustment of the City of Philadelphia (Board) denying Fairmount's variance request. We affirm.

Fairmont [sic] owns property located at 2333-2339 Fairmont Avenue in Philadelphia, Pennsylvania, described as follows:

> Subject property is a three story commercial/residential row structure. It is an intermediate lot fronting within the 2300 block of

> Fairmount Avenue and continuing through to the rear on Olive Street in a C-2 Commercial District. The first floor is occupied by a law office, a real estate office, a sales representative's office. The second floor contains two apartments and a vacant ballet studio. The third floor is occupied by one apartment. An accessory storage area is located on the first floor. No merchandise is sold at the subject property.

(Finding[s] of Fact and Conclusions of Law of the Zoning Board of Adjustment, November 29, 2001 (Board Decision), p. 2, Finding of Fact (FOF) no. 6; *see also* N.T. 3, 5, 8, 9). The existing building is approximately ninety-five (95) feet long and fifty-four (54) feet wide. (Board Decision, p. 2, FOF no. 7). The Board took notice and there are active commercial enterprises currently operating in the building. (N.T. 18-19).

On September 11, 2001, Fairmount filed an application with the Philadelphia Department of Licenses and Inspections (L&I) seeking a zoning permit for a variance "to erect a three-story addition and a second- and third-story expansion and addition at the rear of" its property. (Board Decision, p. 1, FOF no. 1). L&I denied Fairmount's application because Fairmount failed to comply with regulations for rear yard minimum area, rear yard minimum depth and open area as set forth in Section 14-303 of Chapter 14, Zoning and Planning, of the Philadelphia City Code and Home Rule Charter[1] (Philadelphia

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[1] The City of Philadelphia, along with the City of Pittsburgh, are exempt from the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202, which has been the source of zoning and subdivision power in the state

(Continued on following page)

Code).[2] (Board Decision, p. 3, FOF no. 9). Fairmount appealed to the Board on October 2, 2001.

An evidentiary hearing was held on November 28, 2001, at which the Board heard and considered the testimony of representatives of Fairmount, the Fairmount Civic Association, Councilman Darrell Clarke and the Spring Garden Civil Association, and reviewed various letters and petitions addressing Fairmount's application. (Board Decision, pp. 4-5, FOF nos. 18-25; N.T. 10-11). While questioning the president of Fairmount,[3] the Board discovered that the addition for which the variance was being requested had *already been constructed* and was *done without a permit.* (Board Decision, p. 2, FOF no. 2; N.T. 16). In addition, the Board discovered that two (2) cease work orders had

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for all but the exempted governments. The City of Philadelphia derives its zoning power from its status as a home rule community. *Department of General Services v. Ogontz Area Neighbors Association*, 505 Pa. 614, 483 A.2d 448 (1984). "Nevertheless, the requirements set forth in Section 910.2(a) of the MPC are applicable to variances that are sought in Philadelphia pursuant to Section 14-1802 of the [Philadelphia] Zoning Code." *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment for the City of Philadelphia*, 772 A.2d 1040, 1044 n. 4 (Pa. Cmwlth. 2001).

[2] Specifically, Section 14-303(4)(b) states, in pertinent part, that "[t]hat open area shall not be less than 25% of the lot area on [an] intermediate lot. . . . " An intermediate lot is defined as "[a]ny lot other than a corner lot." § 14-102(52). Section 14-303(4)(g)(.2) states, in pertinent part, that "[b]uildings are containing three or more families shall have a rear yard with a minimum depth of nine feet, and a minimum Rear Yard Area of 34 square feet. . . . "

[3] The president of Fairmount is also its attorney, Hae Yeon Baik, Esquire, a/k/a Helen Baik, Esquire. (Board Decision, p. 2, FOF no. 5; N.T. at 5).

been issued to Fairmount *before* a permit was sought. (Board Decision, p. 2, FOF no. 3; N.T. 20).[4] The Board concluded that construction on the Fairmount property reduced the open area on the lot to 18.8%, and totally eliminated the rear yard. (Board Decision, p. 6-7, Conclusion of Law (COL) no. 2). Thereafter, the Board voted unanimously to deny Fairmount's application for a variance, and issued its decision on November 29, 2001.

On December 6, 2001, Fairmount appealed to the Court of Common Pleas of Philadelphia County seeking to *legalize* the zoning status of its building., The trial court entertained oral argument on the issues on May 15, 2002. No additional evidence was presented and the trial court affirmed the Board's decision by order dated June 28, 2002. An opinion followed on August 12, 2002. In the interim, on July 10, 2002, Fairmount appealed the matter to this Court.

On appeal, Fairmount argues that the trial court should have reversed the Board's decision to deny its variance because the Board's decision was an abuse of discretion, an error of law, and lacked sufficient and competent evidential support. In support of its argument, Fairmount avers that (1) the Board applied the wrong standard for the dimensional variance being requested; (2) the Board's refusal amounts to a denial of equal protection and an unconstitutional taking; (3) the

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[4] At the hearing before the Board, Zenobia Harris of Councilman Darrell Clarke's office commented that three (3) cease work orders had been requested for the building. (N.T. 20). However, the Board Decision, p. 2, FOF no. 3, cited to two (2) cease work orders, so that is the number used here.

changes to Fairmount's property are in the public interest; (4) the Board wrongfully considered the number of opponents when making its decision; (5) the case should have been remanded to the Board because the issues were not adequately addressed; and (6) the Board should not have referred to the case to L&I for enforcement. We will address each of these issues seriatim.

In a zoning appeal, when the trial court takes no additional evidence, our scope of review is limited to determining whether the zoning board committed an abuse of discretion or an error of law. *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998). A zoning board abuses its discretion only if its findings are not supported by substantial evidence. *Rollins Outdoor Advertising, Inc. v. Zoning Board of Adjustment*, 529 A.2d 99 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983).

First, Fairmount argues that the Board applied the wrong standard when considering its request for what the Board clearly identified was a dimensional variance.[5] Specifically, Fairmount claims that the sections in the Philadelphia Code dealing with variances, Sections

[5] The Board stated "The only issue before the Zoning Board of Adjustment is a variance from area regulations. The Applicant has not applied for a change in use and no testimony at the hearing indicated any change in use of the subject property." (Board Decision, p. 6, COL No. 1).

14-1801[6] and 14-1802,[7] describe requirements more akin to *use* variances, and in applying them to its

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[6] Section 14-1801 of the Philadelphia Code, entitled Jurisdiction and Powers, states in pertinent part that:

(1) The Zoning Board of Adjustment may, after public notice and public hearing:

* * *

(c) authorize, upon appeal, in specific cases, such variance from the terms of this Title as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of this Title would result in unnecessary hardship, and so that the spirit of this Title shall be observed and substantial justice done, subject to such terms and conditions as the board may decide;

[7] Section 14-1802 of the Philadelphia Code, entitled Criteria for Granting Variances, states:

(1) The Zoning Board of Adjustment shall consider the following criteria in granting a variance under §14-1801(1)(c):

(a) that because of the particular physical surrounding, shape, or topographical conditions of the specific structure or land involved, a literal enforcement of the provisions of this Title would result in **unnecessary hardship**; (b) that the conditions which the appeal for a variance is based are **unique to the property** for which the variance is sought; (c) that the variance will not substantially or permanently injure the appropriate use of adjacent conforming property; (d) that the special conditions or circumstances forming the basis for the variance did **not result from the actions of the applicant;** (e) that the grant of the variance will not substantially increase congestion in the public streets; (f) that the grant of the variance will not increase the danger of fire, or otherwise endanger the public safety; (g) that the grant of the variance will not overcrowd the land or create an undue concentration of population; (h) that the grant of the variance will not impair an adequate supply of light and air to adjacent property; (i) that the grant of the variance will not adversely affect transportation or unduly burden water, sewer, school, park or other public facilities; (j) that the grant of the variance will not adversely

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dimensional variance request,[8] the Board placed an unnecessary hardship on Fairmount and, thus, committed

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affect the public health, safety or general welfare; (k) that the grant of the variance will be in harmony with the spirit and purpose of this title, and (l) that the grant of the variance will not adversely affect in a substantial manner any area redevelopment plan approved by City Council or the Comprehensive Plan for the city approved by the City Planning Commission.

(2) In addition to the criteria set forth in §14-1802(1), the Zoning Board of Adjustment shall also consider the following criteria when granting a variance under §14-1801(1)(c):

(a) that the grant of the variance will not create any significant environmental damage; (b) that the grant of the variance will not significantly increase the danger of flooding; (c) that the grant of the variance will not cause erosion, siltation or pollution that are significant; (d) that the applicant will take reasonable means to minimize environmental damage during construction; (e) that the applicant in developing the site will use reasonable countermeasures in order that the completed project will not create significant environmental damage; (f) that because of the particular physical surroundings, shape, or topographical conditions of the specific structure or land involved, a literal enforcement of the provisions of this title would result in unnecessary hardship; (g) that the conditions upon which the appeal for a variance is based are unique to the property for which the variance is sought; (h) that the variance will not substantially or permanently injure the appropriate use of adjacent conforming property.

(emphasis added).

[8] In *Hertzberg*, the Pennsylvania Supreme Court differentiated between the standards used in determining whether to grant a *use* variance or a *dimensional* variance. It noted that a property owner seeking a dimensional variance within a permitted use "is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Id.* at 257, 721 A.2d at 47. "[T]he grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation." *Id.* The Supreme Court found that the

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an error of law and abused its discretion. The Board, on the other hand, argues that Fairmount failed to provide evidence as to *any* legitimate hardship and cites to the following exchange from the hearing:]

> Chairman Kelly: Give us the hardship to the building, sir. Mr. Glycenfer [Counsel for Fairmount]: The –
>
> Mr. Auspitz [Board member]: I want to note a long, long pause in the record, because nobody can seem to come up with something, quite frankly, because it doesn't exist, and this is a little upsetting, to say the least.

(N.T. 17). The Board avers that Fairmount failed to meet its burden because it did not provide *any* evidence of a hardship, other than its need for the addition to the building in order to expand the size of the apartments (N.T. 17-18) to make them financially viable (Appellant's Brief at 9).

In *Hertzberg*, the Pennsylvania Supreme Court made a "formal declaration" that

> [T]he quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought. . . .

Id. at 258-59, 721 A.2d at 48. Thus, pursuant to the dictates in *Hertzberg*, a dimensional variance requires a

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"quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance . . . is sought." *Id.* at 258-59, 721 A.2d at 48.

less stringent application of the criteria specified in Section 14-1802 of the Philadelphia Code. Accordingly,

> [t]o justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Id. at 264, 721 A.2d at 50.

Here, the record clearly shows that, even under the relaxed requirements of a dimensional variance, Fairmount has not provided sufficient evidence to establish that it has suffered unnecessary hardship. Financial hardship alone is not a sufficient basis for granting a variance. *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment*, 713 A.2d 135 (Pa. Cmwlth. 1998). Property owners do not have a right to utilize their land for the highest and best financial gain. *Id.* Furthermore,

> [w]hile *Hertzberg* eased the requirements for granting a variance for dimensional variances, it did not make dimensional requirements . . . "free-fire zones" for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially "hurt" if it could not do what it wanted to do with the property, even if the property was already being occupied by another use. If that were the case, dimensional requirements would be meaningless – at best, rules of thumb – and the planning efforts that local governments go through in setting them

> to have light, area (side yards) and density (area) buffers would be a waste of time.

Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment of the City of Philadelphia, 771 A.2d 874, 877-78 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 567 Pa. 733, 786 A.2d 992 (2001). *See also Hill District Project Area Committee, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh*, 638 A.2d 278, 280 (Pa. Cmwlth. 1994), *petition for allowance of appeal denied*, 538 Pa. 629, 646 A.2d 1182 (1994) (*citing A.R.E. Lehigh Valley Partners v. Zoning Hearing Board of Upper Macungie Township*, 590 A.2d 842 (Pa. Cmwlth. 1991) ("A variance should not be granted simply because such a grant would permit the owner to obtain a greater profit from the use of the property.")).

Furthermore, "a substantial burden must attend *all* dimensionally compliant uses of the property, not just the particular use the owner chooses." *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001) (emphasis in original). In other words, a variance is appropriate "only where the *property*, not the person, is subject to hardship." *Zappala Group, Inc. v. Zoning Hearing Board of The Town of McCandless*, ___ A.2d ___ (Pa. Cmwlth., No. 979 C.D. 2002, decided November 14, 2002), slip op. at 10 (*quoting Szmigiel v. Kranker*, 298 A.2d 629, 631 (Pa. Cmwlth. 1972) (emphasis in original)). Personal hardships are not sufficient justification. *Bamash v. Zoning Board of Adjustment*, 298 A.2d 629, 631 (Pa. Cmwlth. 1972) (emphasis in original)). Personal hardships are not sufficient justification. *Bamash v. Zoning Board of Adjustment*, 313 A.2d 370 (Pa. Cmwlth. 1974). Thus,

where the hardship asserted by the applicant results *from her own willful violation* of the zoning regulations, an application for a variance should be denied. *See Stratford Arms, Inc. v. Zoning Board of Adjustment*, 429 Pa. 132, 239 A.2d 325 (1968) (variance denied where construction was done "in total and willful disregard of the provision of the zoning ordinance" and the filing of false plans to secure a building permit); *Phillips v. Griffiths*, 366 Pa. 468, 77 A.2d 375 (1951) (new owners enjoined from using converted coach house as private residence where former owner undertook conversion without proper permits in deliberate violation of zoning ordinance after he was denied a variance); *Evans v. Zoning Hearing Board of the Borough of Spring City*, 732 A.2d 686 (Pa. Cmwlth. 1999) (hardship determined to be self-inflicted and variance denied where applicant deviated from building permit and added an apartment without prior permission).

In addition, hardship necessary to justify a variance does not exist where, as here, the property can and is being used in a manner which conforms to the zoning restrictions. *Camp Ramah in the Poconos, Inc. v. Zoning Hearing Board of Worcester Township*, 743 A.2d 1019, 1023 (Pa. Cmwlth. 2000); *Evans* 732 A.2d at 691; *Vito v. Zoning Hearing Board of Whitehall Township*, 458 A.2d 620 (Pa. Cmwlth. 1983).

In its second argument, Fairmount claims the Board's refusal to grant its variance request amounts to a denial of equal protection because *no other* buildings along Olive Street have backyards, and all are built out to the sidewalk. However, Fairmount has offered no evidence as to how or why these other buildings came to have no backyards. *See, e.g., Fotomat Corporation v.*

Zoning Hearing Board of Upper Dublin Township, 414 A.2d 718, 720 (Pa. Cmwlth. 1980) ("[i]t is not unduly speculative to consider that [the other buildings] may have been built either before [the current regulation] was enacted, or that they somehow qualified for a variance"). Further,

> the fact that a variance was granted, maybe even erroneously, for a similar tract does not preclude the municipality from denying a variance that clearly does not conform to the legal prerequisites. The first grant does not cure the shortcomings of the neighboring application. Each must be judged on its own merits.

Drop v. Board of Adjustment, 293 A.2d 144, 146-47 (Pa. Cmwlth. 1972). Thus, existing violations do not preclude the enforcement of zoning regulations. *Id.* Even more important, however, is the Board's argument, as advanced in its brief, that the equal protection argument is waived because it was not properly raised. Arguments relating to the constitutionality of a zoning board's *application* of provisions in its zoning ordinance, neither raised before nor considered by the tribunal below, cannot be initially considered on appeal. See *Richland Township v. Hellerman*, 373 A.2d 1367 (Pa. Cmwlth. 1977). Because Fairmount's equal protection argument was based on the zoning board's application of the ordinance, and it did not raise this argument before the Court of Common Pleas of Philadelphia County, we are precluded from addressing this argument on appeal.

Fairmount also argues that the denial of its variance is an unconstitutional taking because it is being denied the use of its property without being given adequate compensation. However, under Fairmount's

theory, any time a variance is denied, the requesting party could assert a taking. "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation [for a taking]." *Andress v. Zoning Board of Adjustment*, 410 Pa. 77, 89, 188 A.2d 709, 715 (1963). Furthermore, the Board states, and we agree, that the taking argument is without merit because Fairmount already has full use of the building, even if it is not taking full advantage of it. Specifically,

> Although denial of a variance would prohibit the owners of the property from [offering larger apartment units for rent], the Ordinance does not uniquely burden the property so as to prohibit it from being used as a [commercial/residential building] thereby creating an unnecessary hardship peculiar to the property.

Estate of Barbagallo v. Zoning Hearing Board of Ingram Borough, 574 A.2d 1171, 1175 (Pa. Cmwlth. 1990).

In its third argument, Fairmount argues that the changes it proposes for the property are in the public interest. It states that opponents are actually protesting its failure to obtain a permit and not the addition *per se*. Further, Fairmount argues that such opponents do not provide specific objections as to how the building is contrary to the public interest. The Board, however, stresses that *it* decides issues of credibility at zoning hearings which should not be disturbed on appeal if supported by substantial evidence.

Upon our review of the record, we can find no support for Fairmount's argument that changes to the

building *are* in the public interest. No evidence to that effect was presented to the Board. In fact, what we did discover in the record was evidence that the proposed changes *are contrary* to the public interest in that they (1) infringe on the purposes served by the zoning ordinance to monitor and maintain compliance with city standards because changes were made without approval or permission; (2) are unnecessary considering that Fairmount has not experienced hardship and has full use of its property; and (3) are extraneous because 30% of the total floor space in Fairmount's building is vacant and there is no need to add space.

In its fourth argument, Fairmount claims that the Board erred when it considered the number of opponents present at the hearing, and failed to consider the proponents when it made its decision. However, we can find no evidence whatsoever in the record of *any pro*ponents of the variance, other than Fairmount's paid representatives. Therefore, the Board considered the appropriate evidence and cannot be faulted for failing to consider what was not before it.

Fifth, Fairmount argues that its issues were not adequately addressed by the Board and, thus, the case should be remanded. It claims that the Board considered the case in a perfunctory manner, and its representatives were not given sufficient time to explain fully their positions. On the other hand, the Board argues that Fairmount could not sustain its burden at the hearing, and its perception that issues were not adequately addressed is simply a result of its failure to present them.

We can find no indication in the record that Fairmount was denied an opportunity to present its case in full. Moreover, it failed to raise any objections or file a petition to present more evidence. In fact, in its brief, Fairmount does not even discuss what additional evidence it would present if given the opportunity.

Finally, Fairmount claims that the case should not have been referred by the Board to L&I for enforcement, because the Board does not have enforcement responsibilities. However, we agree with the Board's response when it states that the referral to L&I was in direct response to Fairmount's improper conduct of building without a permit.

Accordingly, for all of the reasons outlined above, we affirm the order of the trial court.

/s/ Renée L. Cohn
RENÉE L. COHN, Judge

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fairmount Properties, Inc., Appellant	:	
v.	:	No. 1688 C.D. 2002
Zoning Board of Adjustment of the City of Philadelphia and the City of Philadelphia	:	

ORDER

NOW, January 16, 2003, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby affirmed.

/s/ Renée L. Cohn
RENÉE L. COHN, Judge

Certified from the Record

JAN 16 2003

and Order Exit

APPENDIX C

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL DIVISION SPECIAL DOCKET PROGRAM

Appeal of Fairmount Properties from a decision of the ZBA

Dec. **TERM** 2001
NO. 623

ORDER

AND NOW, this 28th day of JUNE, 2002, it is hereby ORDERED that this appeal is ~~GRANTED~~/DENIED and that the decision of the ZBA dated 11/29/01 is AFFIRMED/~~REVERSED~~.

BY THE COURT:

/s/ Matthew D. Carrafiello, J.
MATTHEW D. CARRAFIELLO, J.

SERVICE:

✓ Counsel for Appellant served ~~in court~~ by mail from ~~opponent by~~ the clerk

✓ Counsel for Appellee served ~~in court~~ by mail from ~~opponent by~~ the clerk

____ Counsel for Intervenor served in court by mail from opponent by the clerk

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

FAIRMOUNT PROPERTIES, INC., Petitioner v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA, Respondents	:	No. 80 EAL 2003 Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 23rd day of May 2003, the Petition for Allowance of appeal is hereby **DENIED**.

TRUE COPY FROM RECORD

Attest: MAY 23 2003

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

FAIRMOUNT PROPERTIES, INC., Petitioner v. ZONING BOARD OF ADJUSTMENT OF THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA, Respondents	No. 80 EAL 2003 Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM

AND NOW, this 2nd day of July 2003, the Application for Reconsideration is hereby **DENIED**.

TRUE COPY FROM RECORD

Attest: JUL 2 2003

/s/ Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

APPENDIX F

NOTICE OF DECISION

City of Philadelphia

ZONING BOARD OF ADJUSTMENT
1401 J. F. K. Blvd. – Concourse Level
Philadelphia, PA 19102-2097

DATE OF DECISION: 11/29/2001

APPLICATION #: 010911004 **CAL#:** 01-1094

ATTORNEY: WILLIAM D. GLYCENTER, ESQ.
1530 CHESTNUT ST.
PHILADELPHIA, PA 19102

APPLICANT: HAE YEON BAIK, ESQ., AKA HELE
2333 FAIRMOUNT AVENUE
PHILADELPHIA, PA 19130

OWNER: **FAIRMOUNT PROPERTIES, INC.**
2333 FAIRMOUNT AVENUE
PHILADELPHIA, PA 19130

LOCATION OF PROPERTY: 2333-39 FAIRMOUNT AVE

THIS IS NOT A PERMIT

The Zoning Board of Adjustment, having held a public hearing in the above numbered appeal, after proper public notice thereof, has decided that the request for (a) USE VARIANCE(S) & ZONING VARIANCE(S) is:

REFUSED

ALL VARIANCES/CERTIFICATES/SPECIAL USE PERMITS GRANTED HEREIN ARE SUBJECT TO THE FOLLOWING CONDITIONS:

1. **A PERMIT MUST BE OBTAINED FROM THE DEPARTMENT OF LICENSES AND INSPECTIONS, PUBLIC SERVICE CONCOURSE, 1401 J. F. K. BLVD., WITHIN ONE CALENDAR YEAR FROM THE DATE OF THIS DECISION.**
2. ALL CONSTRUCTION MUST BE IN ACCORDANCE WITH PLANS APPROVED BY THE ZONING BOARD OF ADJUSTMENT.
3. A NEW APPLICATION AND NEW PUBLIC HEARING WILL BE REQUIRED FOR FAILURE TO COMPLY WITH THE FOREGOING CONDITIONS.
4. FURTHER CONDITIONS:
   *****PUT INTO ENFORCEMENT.*****

By Order of the ZONING BOARD OF ADJUSTMENT
DAVID L. AUSPITZ, Sec.

NOTE: All appeals from this decision are to be taken to the Court of Common Pleas of Philadelphia County within 30 days from the date of this decision.

81-2000 (8/90) Copy-
